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ARTICLES

“Experience Must Be Our Only Guide”: The State Constitutional Experience of the Framers of the Federal Constitution

by ROBERT F. WILLIAMS*

One might almost say that the romance, the poetry and even the drama of American politics are deeply embedded in the many state constitutions promulgated since the publication of Paine's *Common Sense*, the Declaration of Independence, and the Virginia Bill of Rights.

James Q. Dealey¹

Introduction

William Gladstone said the federal Constitution was “the most wonderful work ever struck off at a given time by the hand and purpose of man.”² He did not, however, mean by this note of praise that the Constitution was literally invented or cut from whole cloth at the Philadelphia Convention in the summer of 1787. The drafting of the federal Constitution was, rather, the culmination of approximately two hundred years of unique American constitutional development. The colonial period,

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This Article is part of a larger study of the influences of the early state constitutions on the federal Constitution. See Williams, *Evolving State Legislative and Executive Power During the Founding Decade*, forthcoming in 496 ANNALS 43 (1988) [hereinafter Williams, *Founding Decade*]; Williams, *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST. & BIOGRAPHY 25 (1988). The author gratefully acknowledges financial assistance from the American Council of Learned Societies and a research leave from Rutgers University, both of which made the research for this study possible. The author also received valuable research assistance from William Agee.

1. J. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 11 (1915).

2. Gladstone, *Kin Beyond the Sea*, 127 N. AM. REV. 179, 185 (1878), quoted in Hutson, *The Creation of the Constitution: Scholarship at a Standstill*, 12 REVS. AM. HIST. 463, 467 (1984).

which saw the evolution of colonial charters, and the first decade of independence, during which the first state constitutions were adopted, preceded the federal Constitution.³ As author Willi Paul Adams noted, however, these first attempts to secure individual liberties and establish a system of governance "have lost their primacy of place to the Constitution of 1787/1788."⁴ He continued, "Essentially, the basic structure of the federal Constitution of 1787 was that of certain of the existing state constitutions writ large."⁵

Constitutional scholars have recognized that many of the features of the United States Constitution were modeled on the earlier state constitutions.⁶ This is clear despite current controversies over the reliability of Constitutional Convention records,⁷ or their relevance in determining the "intent" of the Framers with respect to specific issues.⁸ American constitutionalism did not begin in 1787. The federal Constitution actually represents the chronological midpoint in the continuing process of American constitutional development. Therefore, if 1987 was the Bicentennial of the federal Constitution, it may be described more properly as the Quadricentennial of American constitutionalism.

3. "The federal constitution was not the beginning but the climax of American institutional development." Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS 380, 416 (1897).

4. W. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 4 (1980).

5. *Id.*

6. See, e.g., M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 128-29, 203-04 (1913); C. WARREN, *CONGRESS, THE CONSTITUTION AND THE SUPREME COURT* 22-39 (1935).

For example, Peter Hoffer and Natalie Hull observed:

The transformation of impeachment from a check against monarchical misdeeds to an instrument of republican government was first explored in state governments before 1787, and fully realized in the federal Constitution. Between 1776 and 1787, state politicians drafted and tested various provisions for impeachment. Delegates to the federal convention—Madison, Randolph, Paterson, Mason, and Hamilton—supported by the voices and votes of other knowledgeable state leaders, fashioned national impeachment provisions along lines laid down in the states' constitutions.

P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 68 (1984).

Justice Frankfurter, in interpreting the federal Constitution's congressional immunity provisions, noted that "[t]he provision . . . was a reflection of the political principles already firmly established in the States. Three State Constitutions adopted before the federal Constitution specifically protected the privilege." *Tenny v. Brandhove*, 341 U.S. 367, 373 (1965).

7. See, e.g., Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986) (treating questions about the reliability of federal constitutional convention records).

8. See Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177 (1987), and materials cited therein.

I. The Framers and the State Constitutional Experience of the Founding Decade

The fifty-five delegates who attended the 1787 Constitutional Convention already had wide experience, either directly or indirectly, with constitutional theory and constitution-making.⁹ Sydney Fisher described this experience as follows:

When Massachusetts sent her delegates, in the year 1787, to frame the National Constitution, she had had over a hundred and fifty years' experience in constitution-tinkering. During that time she had lived under two charters, a constitution, and an *interregnum*, when she had neither charter nor constitution and was under the direct rule of the Crown . . . During the Revolution she made for herself a constitution which was rejected by her people, but before the Revolution closed she made another, which was accepted.¹⁰

By the time the Constitutional Convention met in the summer of 1787, the thirteen independent states had debated, framed, adopted, rejected, and modified at least twenty state constitutions.¹¹ This count includes Vermont's constitution (the state was not formally admitted to the Union until 1791) and the Connecticut and Rhode Island charters, which were modified and retained in place of formally adopted constitutions.¹² A

9. One scholar estimated that "one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respective state constitutions." Webster, *supra* note 3, at 417. See also J. JAMESON, AN INTRODUCTION TO THE STUDY OF THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE STATES 18 (1886).

"Many of the Philadelphia delegates had joined in preparing these instruments," observed James Bryce, "[and] all had been able to watch and test their operation. They compared notes as to the merits, tested by practice, of the devices which their States had respectively adopted." 1 J. BRYCE, THE AMERICAN COMMONWEALTH 27 (2d rev. ed. 1891).

10. S. FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 20-21 (1897).

11. For excellent summaries of this decade of state constitution-making, see W. ADAMS, *supra* note 4, at 63-93; E. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION (1955); J. MAIN, THE SOVEREIGN STATES, 1775-1783, at 143-85 (1973); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 125-255 (1969). For a dated, but still useful summary, see A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789, at 117-205 (1924).

12. "The institutions written into the American Constitution were heavily dependent on colonial experience and practice, as well as upon the framers' experience of having written and lived under eighteen state constitutions between 1776 and 1786." D. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 1 (1980). See also S. FISHER, *supra* note 10, at 8. Fisher lists 17 state constitutions,

number of leading federal convention delegates, such as James Madison¹³ and George Mason¹⁴ of Virginia, Benjamin Franklin¹⁵ and Gouverneur Morris¹⁶ of Pennsylvania, and Charles Cotesworth Pinckney¹⁷ and John Rutledge¹⁸ of South Carolina, had earlier played important roles in drafting their state constitutions. The same can be said, however, of many lesser known delegates such as John Blair¹⁹ of Virginia; Richard Bassett²⁰ and George Read²¹ of Delaware; Elbridge Gerry,²² Nathaniel Gorham,²³ and Caleb Strong²⁴ of Massachusetts; Daniel of St. Thomas Jenifer²⁵ of Maryland; William Paterson²⁶ of New Jersey; John Langdon²⁷ of New Hampshire; and Robert Yates²⁸ of New York. Finally,

including those that were rejected. Lutz adds the Massachusetts Charter, under which that state operated from 1776 until 1780, to reach his total of eighteen. D. LUTZ, *supra*, at 47.

In addition, several other documents are relevant to this analysis. For example, temporary frames of government were adopted prior to constitutions in states such as Georgia and North Carolina. See W. ADAMS, *supra* note 4, at 82-83 (Georgia); *id.* at 81 (North Carolina). Several New Hampshire drafts were proposed and rejected between 1778 and 1784. See E. DOUGLASS, *supra* note 11, at 329-39; J. MAIN, *supra* note 11, at 215-16. Drafts of a constitution for the "state" of Frankland (part of North Carolina) were circulated and discussed, and a constitutional convention was held in 1784 by persons seeking to create a separate state. See W. ADAMS, *supra* note 4, at 94-95; W. BREWSTER, *THE FOURTEENTH COMMONWEALTHS: VERMONT AND THE STATES THAT FAILED* 181 (1960); W. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 34 n.10 (1910). Many men, including James Madison, gave advice on a constitution for Kentucky, which was not admitted to the Union until 1792. Letter from Madison to Caleb Wallace (Aug. 23, 1785) in 8 *THE PAPERS OF JAMES MADISON* 350-58 (R. Rutland & W. Rachal eds. 1973). See J. COWARD, *KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING* 11 (1979). "Kentucky became something of a testing ground, a focus, for the debate upon constitutional ideas, assumptions and structures." *Id.* at 3.

13. R. KETCHAM, *JAMES MADISON: A BIOGRAPHY* 68-72 (1971).

14. H. MILLER, *GEORGE MASON: GENTLEMAN REVOLUTIONARY* 138-59 (1975); R. RUTLAND, *GEORGE MASON: RELUCTANT STATESMAN* 49-63 (1961).

15. D. MCGEE, *FRAMERS OF THE CONSTITUTION* 180 (1968).

16. Morris played an important role in New York leading to the state's constitution of 1777. E. DOUGLASS, *supra* note 11, at 63-65; see M. MINTZ, *GOVERNEUR MORRIS AND THE AMERICAN REVOLUTION* 68-87 (1970).

17. E. DOUGLASS, *supra* note 11, at 35-41.

18. *Id.* at 35, 41.

19. H. MILLER, *supra* note 14, at 240; Drinard, *John Blair, Jr., 1732-1800*, 39 *PROC. ANN. MEETING VA. ST. B.* 436, 439 (1927).

20. J. MAIN, *supra* note 11, at 165.

21. Reed, *The Delaware Constitution of 1776*, 6 *DEL. NOTES* 7, 21 (1930).

22. 1 J. AUSTIN, *THE LIFE OF ELDRIDGE GERRY* 78 (1928-1929).

23. D. MCGEE, *supra* note 15, at 60.

24. R. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1790: A SOCIAL COMPACT* 21 (1974).

25. R. HOFFMAN, *A SPIRIT OF DISSENSION: ECONOMICS, POLITICS, AND THE REVOLUTION IN MARYLAND* 206 (1973).

26. D. MCGEE, *supra* note 15, at 136.

27. J. DANIELL, *EXPERIMENT IN REPUBLICANISM: NEW HAMPSHIRE POLITICS AND THE AMERICAN REVOLUTION 1741-1794*, at 168-69 (1970).

some of the most well-known figures associated with the federal Constitution, but who were not delegates in 1787, such as Thomas Jefferson,²⁹ John Adams,³⁰ and John Jay,³¹ had had direct involvement with developing their state constitutions.

With the end to British rule at Independence, there was a high degree of discussion, trading of ideas, copying of texts, and argument about the fundamental questions of governmental structure within the states as well as among them. Thus, when the Continental Congress convened in Philadelphia, the delegates were aware of the need for new state constitutions and the controversies surrounding them.³² State constitutions, even draft versions,³³ were published in Philadelphia newspapers, and all of the well-known pamphlets on state constitutions were available to the congressional delegates.³⁴ Philadelphia thus became the center of debate over state constitutions, where many of the future federal constitutional convention delegates took part in the debates.

As early as July 15, 1776, Josiah Bartlett of New Hampshire, which had already adopted a temporary state constitution in January 1776, wrote home from Philadelphia to John Langdon, a future delegate to the federal Constitutional Convention, that the constitutions "of Virginia and New Jersey are in this city. I shall send them forward, and the Constitutions of the other Colonies as they are formed, as possibly something may be taken from them to amend our own."³⁵ This interest in, and direct involvement with, the state constitutions continued through the decade leading up to the 1787 Constitutional Convention.

28. A. YOUNG, *THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763-1797*, at 17 (1967).

29. H. MILLER, *supra* note 14, at 146, 157-58, 161; 6 *THE PAPERS OF THOMAS JEFFERSON* 217-316 (J. Boyd ed. 1952) [hereinafter J. BOYD]; Anderson, *Jefferson and the Virginia Constitution*, 21 *AM. HIST. REV.* 750 (1916); Swindler, *Virginia Constitutional Commentaries: The Formative Period, 1776-1803*, 21 *WM. & MARY L. REV.* 358, 366-69 (1979).

30. R. PETERS, *supra* note 24, at 13-14, 23-24.

31. JOHN JAY: *THE MAKING OF A REVOLUTIONARY—UNPUBLISHED PAPERS 1745-1780*, at 389-418 (R. Morris ed. 1975) [hereinafter JOHN JAY]; B. MASON, *THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777*, at 225 (1966).

32. W. ADAMS, *supra* note 4, at 94 n.111.

33. H. MILLER, *supra* note 14, at 154.

34. P. SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* 172 n.11, 173-75 (1936). Those in other states took a special interest in the drafting of the Pennsylvania Constitution. *Id.* at 171 (quoting *Pa. Evening Post*, July 30, 1776).

35. Letter from Josiah Bartlett to John Langdon (July 15, 1776) in 4 *LETTERS OF THE DELEGATES TO CONGRESS, 1774-1789*, at 459, 460 (P. Smith ed. 1980) [hereinafter P. SMITH], quoted in R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 44 (1955). Rut-

II. State Constitution-Making During the Founding Decade

Immediately prior to Independence, and for the decade that followed, the states, in the words of historian Jackson Turner Main, "became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries."³⁶ Contemporaries of this period understood the experimental nature of these efforts at constitution-making. In 1778, for example, Thomas Paine applauded "the happy opportunity of trying a variety, in order to discover the best. . . . By diversifying the several constitutions, we shall see which State flourish the best, and out of the many posterity may choose a model"³⁷

This experimentation in constitution-making was evident in the New York Constitution of 1777. Article VI, dealing with the transition from voice voting to the use of ballots, provided for "a fair experiment" with ballot voting after the war was over.³⁸ "[A]fter a full and fair experiment shall be made of voting by ballot," the provision continued, the legislature could return to voice voting, but only by a two-thirds vote.³⁹

land quotes Bartlett as referring to the constitutions of Virginia and New York. This must be incorrect because New York's constitution was not adopted until April 1777.

William Hooper wrote from Philadelphia on October 27, 1776, to Joseph Hewes: "I inclose you the Constitutions of several states for the speculation of yourself and friends." 5 P. SMITH, *supra*, at 407, 410.

36. Main, *The American States in the Revolutionary Era*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 1, 23 (R. Hoffman & P. Albert eds. 1981).

Justice Brandeis' better known description of the states as "laboratories" was in reference to state legislative innovations at the beginning of the twentieth century. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) ("social experiments . . . in the insulated chambers afforded by the several States . . .").

37. *A Serious Address to the People of Pennsylvania on the Present Situation of their Affairs*, in PENNSYLVANIA PACKET (Dec. 1, 1778), reprinted in 2 P. FONER, *THE COMPLETE WRITINGS OF THOMAS PAINE* 277, 281 (1969).

The author of the 1776 pamphlet, *Four Letters on Interesting Subjects*, argued:

Perhaps most of the Colonies will have two houses, and it will probably be of benefit to have some little difference in the forms of government, as those which do not like one, may reside in another, and by trying different experiments, the best form will the sooner be found out, as the preference at present rests on conjecture.

Anonymous, *Four Letters on Interesting Subjects*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 368, 387 (C. Hyneman & D. Lutz eds. 1983). See also D. HAWKE, *IN THE MIDST OF A REVOLUTION* 196-97 (1961). Contemporary Thomas Smith wrote rather bitterly about the 1776 Pennsylvania Constitutional Convention: "You know that experimental philosophy was in great repute fifty years ago, and we have a mind to try how the same principle will succeed in politics!" *Id.* at 191.

38. N.Y. CONST. art. VI (1777) in 7 W. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 173-74 (1978).

39. *Id.*

The "founding decade",⁴⁰ half of it while the Revolution was still in progress,⁴¹ reflected an intense and concentrated focus on written constitutional theory and practice.⁴² Delegates to the Continental Congress complained that their colleagues were neglecting national issues and returning home to work on their state constitutions. "*Constitutions* employ every pen," complained one delegate.⁴³ Thomas Jefferson unsuccessfully sought permission to return to Virginia to work on the state constitution, arguing that "it is the whole object of the present controversy."⁴⁴ As Carl Becker later wrote, this decade witnessed the internal political struggle over "who should rule at home" as well as the Revolutionary War struggle for "home rule."⁴⁵ Even if one does not accept Becker's

40. This is Martin Diamond's term for the period 1776 to 1787. See Diamond, *Decent, Even Though Democratic*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 18, 24 (R. Goldwin & W. Schambra eds. 1980).

41. When reading the first state constitutions it is easy to forget that most of them were drafted and adopted during wartime. Cecelia Kenyon noted:

If it is difficult for us to imagine Washington or Jefferson captured by the British and shot or hanged as traitors, it is even more difficult to remember that every member of the state assemblies or conventions that drafted constitutions was publicly committing himself to the Revolution and therefore placing his life in jeopardy should the Revolution fail

Kenyon, *Constitutionalism in Revolutionary America*, in *NOMOS XX: CONSTITUTIONALISM* 84, 91-92 (J. Pennock & J. Chapman eds. 1979).

The issues of independence and military confrontation had a major impact on many of the state constitution drafters, particularly in Pennsylvania and New York. See E. COUNTRYMAN, *A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790*, at 163-65 (1981). Certainly, no similar statement could be made about the delegates to the Constitutional Convention in 1787.

42. William Morey observed in 1893 that "the most eventful constitution-making epoch in our history was not the year 1787, but an antecedent period extending from 1776 to 1780." Morey, *The First State Constitutions*, 4 *ANNALS* 201, 201 (1893).

Harry Cushing asserted: "In the history of the use of the written constitution as a basis of government, no period so brief has been marked by such activity in constituent proceedings and by such political path-breaking as the decade of the American Revolution." Cushing, *"The People the Best Governors,"* 1 *AM. HIST. REV.* 284, 284 (1896). See also B. WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1787*, at 89 (1958) (suggesting that the 1787 Convention would have been a failure without "the example, experience, and the constructive achievements of 1776 and the years immediately thereafter.").

43. Letter from Francis L. Lee to Landin Carter (Nov. 9, 1776) in 5 P. SMITH, *supra* note 35, at 461, 463 (emphasis in original).

44. Letter from Thomas Jefferson to Thomas Nelson (May 16, 1776) in 4 P. SMITH, *supra* note 35, at 12, 13.

45. C. BECKER, *THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK, 1760-1776*, at 22 (1909).

From 1765 to 1776, therefore, two questions, about equally prominent, determined party history. The first was whether essential colonial rights should be maintained; the second was by whom and by what methods they should be maintained. The first was the question of home rule; the second was the question, if we may so put it, of who should rule at home.

assertion that the struggle over who should rule at home began *prior* to the Revolution, one must concede that this domestic constitutional issue was a central focus, together with military victory, from 1776 to 1787.

The state constitutions forged during this period thus formed the "connecting links"⁴⁶ between the unique American colonial institutions that had evolved in the seventeenth and eighteenth centuries and the federal Constitution framed in 1787. Although it is impossible to understand these early state constitutions without referring to the evolution of colonial charters and institutions, the state constitutions clearly provided the most immediate frame of reference for the convention delegates in 1787. They are, even today, in the words of James Bryce, "a mine of instruction for the natural history of democratic communities."⁴⁷ The very idea of a specialized constitutional convention followed by a separate mechanism for popular ratification, which apparently was an obvious procedure by 1787, was the product of a painstaking period of trial and error with constitution-making processes in the states from 1776 to 1787.⁴⁸ Notably, the earlier Articles of Confederation had been drafted by the Congress and ratified by the state legislatures.⁴⁹

Several important points have become much clearer since earlier studies of the state constitution-making during the founding decade. It is now apparent, for example, that a greater fundamental controversy and diversity of opinion existed in the state constitution-making experience than was earlier thought. As one historian noted:

46. "The chief historical significance which attaches to the first State constitutions rests in the fact that they were the *connecting links* between the previous organic law of the colonies and the subsequent organic law of the Federal Union." Morey, *supra* note 42, at 202 (emphasis added).

A similar observation was made by James Bryce: "The State Constitutions are the oldest things in the political history of America, for they are continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created. . . ." 1 J. BRYCE, *supra* note 9, at 413. See also R. SCHUYLER, CONSTITUTION OF THE UNITED STATES 15-16 (1923).

47. 1 J. BRYCE, *supra* note 9, at 434.

James Dealey referred to state constitutions as "a cinematoscope of the times." J. DEALEY, *supra* note 1, at 2.

48. See generally W. ADAMS, *supra* note 4, at 63-98; 1 R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800, at 213-35 (1959); Tate, *The Social Contract in America: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375 (1965).

For an in-depth study of social contract theory in Massachusetts, see R. PETERS, THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT (1978).

49. See generally M. JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 (1940).

Large numbers of those unable to vote or hold political office felt that the primary purpose of the [Revolutionary War] was to abolish the political institutions by which privilege had been maintained in the colonial governments. Thus when the question of home rule was succeeded by the question of who would rule at home, these groups of humbler rebels attempted to obtain equal consideration for themselves by demanding that democratic reforms be written into the new state constitutions.⁵⁰

Controversy surrounded both substantive questions of state constitutional content and procedural questions concerning the process of drafting and adopting the state constitutions. There was a wide range of opinion even within the general consensus that the new state governments should be "republican." In fact, this consensus was one "that promoted discord rather than harmony."⁵¹ These differing interests, initially clashing over the framing of the first state constitutions, formed the basis of the political parties that lasted into the early nineteenth century.⁵²

The ultimate outcomes of the constitutional battles in the states were much closer and more contingent than has been commonly recognized. Most studies of the early state constitutions focus exclusively on the documents as finally adopted.⁵³ Those whose ideas did not prevail have been forgotten⁵⁴ in much the same way that the antifederalists were, until recently, forgotten.⁵⁵ Despite their relative obscurity today, the unsuccessful arguments in the framing of the state constitutions were not lost on the delegates in Philadelphia in 1787.

To a certain extent, investigating the constitutional theories and political positions of those who did not prevail in most of the early state

50. E. DOUGLASS, *supra* note 11, at vi. See also M. JENSON, *THE AMERICAN REVOLUTION WITHIN AMERICA* 50-51 (1974); G. NASH, *THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION* 340 (1979).

51. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 72 (1972). See also R. KELLEY, *THE CULTURAL PATTERN IN AMERICAN POLITICS: THE FIRST CENTURY* 68-69 (1979); Bloch, *The Constitution and Culture*, 44 WM. & MARY Q. 550 (1987).

52. See generally J. MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* (1973) (tracing the early development of political parties).

53. See, e.g., Morey, *supra* note 42; Webster, *supra* note 3; Black, *The Formation of the First State Constitutions*, 7 CONST. REV. 22, 31 (1923) (noting "ready acceptance of closely parallel institutions, formulas and political ideas").

54. Donald Lutz pointed out the importance of ideas that were rejected at the state constitutional conventions, in addition to those that were adopted. See D. LUTZ, *supra* note 12, at 1. These rejected ideas undoubtedly were fresh in the minds of the delegates to the federal Constitutional Convention in 1787.

55. See C. KENYON, *THE ANTIFEDERALISTS* (1966); H. STORING, *THE COMPLETE ANTIFEDERALIST* (1981). Difficult as it was to collect the materials for the Antifederalists, the task is multiplied many times when looking at the state constitutions. But see *infra* note 57.

constitutional conventions calls for a view of the conventions "from the bottom up,"⁵⁶ or for "listening to the 'inarticulate.'"⁵⁷ The ideas of these early constitutional theorists provide an important alternative perspective on what is too often portrayed as a consensus view of the proper constitution of government during the founding decade.⁵⁸

It now appears, for example, that there was a fairly widespread, radically democratic vision of a proper state constitution and the process for its adoption, which arose to some extent during the framing of most of the state constitutions. Jesse Lemisch, an historian of the "inarticulate", notes that "there existed in 1776 a body of political thought which did not endorse deference" to traditional elites.⁵⁹ Although historians consider this assertion controversial, some documentation exists to support the thesis.⁶⁰ Even in the absence of documentation, asserts Lemisch, less articulate people must have shared these ideas "directly out of the actual experience of their lives."⁶¹ A good example of this was the demand, made at gunpoint, by voters in five Maryland counties that they were "qualified" to vote for delegates to the state constitutional convention of 1776 despite their inability to meet the formal property ownership requirements.⁶² Failure to take account of these alternative visions has resulted in state constitutional studies based only on "examinations of the minority at the top."⁶³

56. Lemisch, *The American Revolution Seen from the Bottom Up*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 3 (B. Bernstein ed. 1968).

57. Lemisch, *Listening to the "Inarticulate": William Widger's Dream and the Loyalties of American Revolutionary Seamen in British Prisons*, 3 J. SOC. HIST. 1 (1969-1970).

Because, with creativity and hard work, documents reflecting the views of the people toward the bottom of society can be uncovered, Lemisch asks "is it not time that we put 'inarticulate' in quotation marks and begin to see the term more as a judgment on the failure of historians than as a description of historiographical reality?" *Id.* at 28-29. Thus, Charles Mullett's comment about the "inarticulate" that though their history "is worthy, its achievement must be left to God" is fundamentally inaccurate. See Mullett, Book Review, 35 J.S. HIST. 77, 78 (1969) (reviewing *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* (B. Bernstein ed. 1968)).

58. Donald Lutz observed the tendency to emphasize the continuities in constitutional development between the Declaration of Independence in 1776 and the federal Constitution of 1787. He concluded: "A careful examination of state constitutions written in the period between these two documents will reveal that the discontinuities are more important." D. LUTZ, *supra* note 12, at xv.

59. Lemisch, *supra* note 56, at 16.

60. See *infra* note 62 and accompanying text.

61. Lemisch, *supra* note 56, at 16.

62. R. HOFFMAN, *supra* note 25, at 169-70.

63. Lemisch, *supra* note 56, at 4. "[S]ympathy with the victims of historical processes and skepticism about the victors' claims provide essential safeguards against being taken in by the dominant mythology." *Id.* at 5 (quoting B. MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP*

Except in the case of Massachusetts,⁶⁴ the early stages of state constitutional development are not well documented.⁶⁵ There are at least thirteen separate stories regarding state constitutional development,⁶⁶ none of which is completely understood today. Some important patterns, however, are generally discernable.

Historians⁶⁷ and political scientists⁶⁸ have identified two major "waves" of state constitution-making during the founding decade. The key point in the first wave was the Pennsylvania Constitution of 1776; the Massachusetts Constitution of 1780 was the central feature of the second wave. "The 1780 Massachusetts Constitution," asserts Donald Lutz, "was the most important one written between 1776 and 1789 because it embodied the Whig theory of republican government, which came to dominate state level politics; the 1776 Pennsylvania Constitution was the second most important because it embodied the strongest alternative."⁶⁹

The first wave of state constitutions is generally seen to include those adopted during the first year after Independence.⁷⁰ For the most part, legislative bodies hastily drafted new constitutions at the beginning

AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD 522-23 (1966)).

"The history of the powerless, the inarticulate, the poor has not yet begun to be written because they have been treated no more fairly by historians than they have been treated by their contemporaries." *Id.* at 9. See also Lemisch, *Radical Plot in Boston (1770): A Study in the Use of Evidence*, 84 HARV. L. REV. 485, 501-03 (1970) (reviewing H. ZOBEL, *THE BOSTON MASSACRE* (1970) (expressing Lemisch's views about the history of the inarticulate)).

64. See, e.g., *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780* (O. & M. Handlin eds. 1966); R. PETERS, *supra* note 24; R. TAYLOR, *MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780* (1961); *PROVINCE IN REBELLION: A DOCUMENTARY HISTORY OF THE FOUNDING OF THE COMMONWEALTH OF MASSACHUSETTS, 1774-1775* (L. Wroth ed. 1975); Cella, *The People of Massachusetts, A New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority 1774-1780*, 14 SUFFOLK U.L. REV. 975 (1980).

65. Kenyon, *supra* note 41, at 92.

66. See C. BROWNE, *STATE CONSTITUTIONAL CONVENTIONS, FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776-1959: A BIBLIOGRAPHY* (1973). John Adams contended in 1786 that "[t]here have been in fact 13 Revolutions, for that number of established governments were overthrown and as many new ones erected." M. JENSEN, *supra* note 49, at 1. See also J. MAIN, *supra* note 11, at 455 ("anyone trying to develop a general understanding of the period must read the original sources.").

67. See, e.g., G. WOOD, *supra* note 11, at 435.

68. See, e.g., D. LUTZ, *supra* note 12, at 44-45.

69. *Id.* at 129. See also C. KENYON, *supra* note 55, at xxx (noting that some commentators focus on differences among state constitutions "emerging from sharp conflict between democratic and antidemocratic forces, with the constitutions of Pennsylvania and Massachusetts representing respectively the victories of the two sides."); Kenyon, *supra* note 41, at 92.

70. See, e.g., N.J. CONST. (1776), 6 W. SWINDLER, *supra* note 38, at 449 (1976); VA. CONST. (1776), 10 W. SWINDLER, *supra* note 38, at 48 (1979); DEL. CONST. (1776), 2 W. SWINDLER, *supra* note 38, at 197 (1973).

of the Revolution. These new constitutions did not differ much from the colonial charters they replaced except in providing weakened executive power and including declarations of rights. The drafters gave little consideration to structural mechanisms to check the dominant legislatures, though South Carolina's constitution of 1776 contained an absolute gubernatorial veto.⁷¹ Most of these constitutions also created upper houses within their legislatures.

Although the 1776 Pennsylvania Constitution did not fit this description in a number of respects,⁷² it represented the culmination of the first wave and the direct stimulus for the second wave. Pennsylvania's radical constitutional plan was drafted by a special convention elected for that purpose, and it followed Thomas Paine's brief recommendations in *Common Sense*⁷³ that "simple" republican governments, with a wide elective franchise and a minimum of "aristocratic" features such as upper houses and other impediments to the expressed will of the people, be established.

The second wave was much longer than the first, lasting from 1777, when the New York constitution was adopted, to 1780, when Massachusetts finally adopted its 1780 constitution.⁷⁴ The state constitutions of the second wave were adopted in a more deliberate fashion, often by specially elected conventions. These second wave documents reflected a direct concern with mechanisms to check actions by the dominant legislative branches. This was the approach recommended in 1776 by John Adams in *Thoughts on Government*.⁷⁵ Adams had set forth an alternate, more traditional vision of how the new state governments should be constituted. He proposed a model based upon "balanced government", or checks and balances, to which bicameralism and executive power were central. He also advocated property requirements for holding office and voting.

71. S.C. CONST. art. VII (1776), 8 W. SWINDLER, *supra* note 38, at 464 (1979). *But see infra* notes 100-104 and accompanying text.

72. Pennsylvania's 1776 constitution was framed by a constitutional convention elected for that purpose. It included only a unicameral legislature with no upper house and contained an early mechanism to seek out constitutional violations. *See generally* Williams, *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, 112 PA. MAG. HIST. & BIOGRAPHY 25 (1988).

73. 1 P. FONER, *supra* note 37, at 4.

74. *See, e.g.*, N.Y. Const. (1777), 7 W. SWINDLER, *supra* note 38, at 168 (1978); Mass. Const. (1780), 5 W. SWINDLER, *supra* note 38, at 92 (1975); N.H. Const. (1784), 6 W. SWINDLER, *supra* note 38, at 344 (1976).

75. 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 401 (C. Hyneman & D. Lutz eds. 1983).

As early as 1776, therefore, the crucial constitutional issues of the founding decade—how the new governments would be structured and who would participate in them, directly as officeholders and indirectly as voters—were joined in the writings of Paine and Adams. These issues formed the battleground for the contending interests in the state constitutional conventions from 1776 to 1787 and would preview many of the difficult questions at the federal Constitutional Convention in 1787.⁷⁶ Adams' ideas ultimately prevailed, though Paine's ideas carried the day in a few states and influenced the structure of, or at least representation in, most state legislatures. Historian Elisha Douglass concluded that Adams' *Thoughts on Government* was probably the "paramount guide" for constitution-making in at least five states.⁷⁷ And, he continued, "when it is considered that the state constitutions—particularly that of Massachusetts—were the greatest single influence on the federal Constitution, the full importance of the pamphlet should be evident."⁷⁸

Although the tendency to analyze historical events on the basis of oversimplified dichotomies should be avoided,⁷⁹ it is clear that these two competing views of governmental structure emerged in the framing of the state constitutions during the founding decade. As one historian observed, "[t]he dominant and ultimately triumphant [view] was toward constitutional stability. The other, weaker but still noteworthy, was toward some form of popular council democracy."⁸⁰

Alfred Young neatly captured the range of possibilities presented to state constitution drafters during the founding decade.⁸¹ In describing the polar positions of the contending groups leading to what he characterized as the "middle-of-the-road" New York Constitution of 1777, which marked the beginning of the second wave, Young wrote:

The constitution of 1777 retained many aristocratic features. . . . At the same time the constitution made several democratic departures from provincial precedent. . . . Had extreme conservatives had their way, they would have gotten elections at four-year intervals by voice voting, an upper house indirectly chosen, a governor elected by an upper house, and a governor with more of the powers of his royal predecessors. Had the most democratic elements had

76. See generally Williams, *Evolving State Legislative and Executive Power during the Founding Decade*, 496 ANNALS 43 (1988).

77. E. DOUGLASS, *supra* note 11, at 32.

78. *Id.*

79. See Kenyon, *Republicanism and Radicalism in The American Revolution: An Old-Fashioned Interpretation*, 19 WM. & MARY Q. 153, 154-55 (1962); W. ADAMS, *supra* note 4, at 147.

80. Countryman, *Some Problems of Power in New York, 1777-1782*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY, *supra* note 36, at 157, 158-59.

81. A. YOUNG, *supra* note 28.

their way, there would have been taxpayer suffrage, a secret ballot for all elections . . . annual election of all state officials, and popular election of county and local officials; furthermore the appointive power would have been vested exclusively in the assembly and the governor's veto power would have been eliminated.⁸²

A. The Legislative Branch in the Early State Constitutions

The primary focus of the radical democrats was on the legislative branch. In virtually every state, these elements raised issues relating to broader suffrage, fairer apportionment, annual elections, elimination of property requirements for holding office, unicameralism, and elimination of executive interference with legislative policy. Even though only three states—Pennsylvania, Georgia, and Vermont—adopted unicameral legislatures, and most states continued to impose certain property requirements for voting and holding office, virtually all the state legislatures of the founding decade differed distinctly in operation from their colonial counterparts.

Most of the early state constitutions, although expressly recognizing the doctrine of separation of powers,⁸³ “tended to exalt legislative power at the expense of the executive and the judiciary.”⁸⁴ This increased legislative dominance came primarily at the expense of the executive, which had come to be identified with the British Crown against which the colonial assemblies had struggled but never succeeded in achieving anything more than shared power.⁸⁵ With the advent of Independence, this conflict with the colonial executive could be completed;⁸⁶ the states were free to structure their governments as they saw fit. James Wilson, a key federal convention delegate, ruefully noted the “excessive partiality” to the state legislature, “into [whose] lap, every good and precious gift was profusely thrown.”⁸⁷ James Madison also warned the Federal Convention that state legislatures had become “omnipotent” because “[e]xperience had proved a tendency in our governments to throw all

82. *Id.* at 20-21. For similar general descriptions of the opposing viewpoints on state constitutions, see J. MAIN, *supra* note 11, at 184-85; B. MASON, *supra* note 31, at 231-34; Lemisch, *supra* note 56, at 11-16; Main, *supra* note 36, at 24-27; Patterson, *The Roots of Massachusetts Federalism: Conservative Politics and Political Culture Before 1787*, in SOVEREIGN STATES IN AN AGE OF UNCERTAINTY, *supra* note 36, at 31, 42-43.

83. See C. KENYON, *supra* note 55, at xxix; Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514 (1924-1925).

84. W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 21 (1972).

85. For a summary of the powers of the colonial executive, see J. MAIN, *supra* note 11, at 99-103.

86. *Id.* at 143-44.

87. 1 THE WORKS OF JAMES WILSON 357 (R. McCloskey ed. 1967).

power into the Legislative vortex.”⁸⁸

In the majority of states, even though bicameral legislatures were created, the lower houses were clearly the most important.⁸⁹ Not only was membership in the lower houses expanded to include “new men” through reapportionment and lower suffrage and office holding requirements, but these bodies also assumed powers formerly exercised by colonial magistracies.⁹⁰

The upper houses in the Revolutionary state constitutions were the direct descendants of the colonial governor’s councils,⁹¹ which performed both executive and legislative functions. Independence brought a dramatic change to these governmental bodies. Virginia, in 1776, was the first to call its upper house a “senate.”⁹² Historian Main concluded, “[e]ven those senates that were intended to be aristocratic were indelibly marked by the vigorous democratic movement.”⁹³ After the Revolution, the senators no longer owed their seats to the Crown, but were instead responsible to the electorate.⁹⁴ Donald Lutz described the general picture: “The overall result was that senates were somewhat more conservative than lower houses and protected property more carefully; but they failed to provide a consistent check on lower houses, as had been intended.”⁹⁵

The senators began to respond to the electorate in basically the same way as members of the lower houses were responding. Most states found themselves in the position Alfred Young described in New York:

From a conservative point of view it was apparent that the state constitution was not functioning as it was supposed to. . . . The senators, presumably the protectors of property, “are more eager in the pursuit of popularity than the Assembly,” a Livingston complained. “The democratical part of the government is always encroaching.”⁹⁶

88. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (M. Farrand ed. 1911) [hereinafter M. FARRAND]. See also *id.* at 74.

89. J. MAIN, *supra* note 11, at 200.

90. *Id.* at 205. See also G. WOOD, *supra* note 11, at 162-63.

91. S. FISCHER, *supra* note 10, at 72-73.

92. *Id.* at 75.

93. J. MAIN, *THE UPPER HOUSE IN REVOLUTIONARY AMERICA, 1763-1788*, at 99 (1967).

In addition to indirect elections, other conservative features of state senates included high property qualifications for office, longer terms than for the lower house, and staggered terms. See D. LUTZ, *supra* note 12, at 89.

94. D. LUTZ, *supra* note 12, at 89.

95. *Id.* at 92. See also G. WOOD, *supra* note 11, at 503-04.

96. A. YOUNG, *supra* note 28, at 62 (citations omitted).

B. Governors in the Early State Constitutions

The governorship was profoundly transformed in the first state constitutions from an instrument of British policy during the colonial period with prerogative powers that included an absolute veto of legislative acts,⁹⁷ to a legislatively appointed office almost totally beholden to the newly dominant state legislatures. After struggling so long against powerful governors, it would have been politically impossible for the newly independent states to adopt strong governorships.⁹⁸ This was true even though at the time of Independence there was a pressing need for the exercise of decisive power, particularly in matters arising from the war.⁹⁹

Although the early state constitutions produced generally weak, legislatively dominated governorships, this result was not unanimous. South Carolina's conservative 1776 constitution, for example, provided its president with an absolute veto over legislation.¹⁰⁰ The presidential veto, however, became a target for reformers¹⁰¹ and was eliminated in the 1778 revised constitution adopted by the legislature. John Rutledge, a future federal convention delegate, had served as president under the 1776 South Carolina Constitution.¹⁰² He tried unsuccessfully to exercise the constitutional veto power to block the 1778 instrument eliminating that very power,¹⁰³ arguing that the proposal would "annihilate[] one branch of the legislature."¹⁰⁴

Despite the relatively circumscribed authority of most Revolutionary governors, which led James Madison to characterize the position as "the grave of all useful talents,"¹⁰⁵ a number of distinguished leaders in addition to Rutledge served in the post. Among them were Patrick Henry, Thomas Jefferson, and Benjamin Harrison in Virginia; John Han-

97. S. FISCHER, *supra* note 10, at 17; M. JENSEN, *supra* note 49, at 107; J. MAIN, *supra* note 11, at 102.

The exception to this rule was in Rhode Island where neither the governor nor the Crown had a veto over assembly acts. This led a recent scholar to assert that the "Rhode Island General Assembly was among the most nearly autonomous legislative bodies in the British Empire." P. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT, 1776-1841*, at 45 (1977).

98. J. MAIN, *supra* note 11, at 143-44.

99. See M. MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 14 (1943).

100. J. MAIN, *supra* note 11, at 148.

101. R. WALSH, *CHARLESTON'S SONS OF LIBERTY: A STUDY OF THE ARTISANS 1763-1789*, at 81-82 (1959).

102. E. DOUGLASS, *supra* note 11, at 35.

103. J. MAIN, *supra* note 11, at 148.

104. 1 D. RAMSAY, *THE HISTORY OF THE REVOLUTION OF SOUTH CAROLINA* 132 (1785).

105. Evans, *Executive Leadership in Virginia 1776-1781: Henry, Jefferson and Nelson*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY*, *supra* note 36, at 185, 186 (quoting 1 I. BRANT, *JAMES MADISON* 316 (1941)).

cock in Massachusetts; and John Dickinson, who served in both Pennsylvania and Delaware.¹⁰⁶ Partly as a result of the stature of these individuals, and partly because they exercised a wide range of statutorily granted powers beyond those formally reflected in the state constitutions,¹⁰⁷ it is now recognized that the governors of the founding decade were more important and their authority more stable than originally thought.¹⁰⁸

John Jay, the principal drafter of the New York Constitution of 1777, proposed a veto power over legislation that was to be exercised by a Council of Revision, made up of the governor, the justices of the Supreme Court, and the chancellor.¹⁰⁹ An early draft of the constitution had proposed a weak governorship, as was found in other states.¹¹⁰ After considerable delay, the convention adopted the Council of Revision veto mechanism.¹¹¹ Included in article III was an express justification stating the veto power was necessary because "laws inconsistent with the spirit of this constitution or with the public good may be hastily or inadvisedly passed."¹¹² Notably, the Council's veto authority was modified, rather than absolute, in that it could be overridden by the legislature.

New York also provided for the first popularly elected governor,¹¹³ beginning a trend¹¹⁴ toward a republican executive—elected by, and responsible to, the electorate.¹¹⁵ When George Clinton was elected, partially as a result of the elimination of voice voting, it "ruffled conservatives."¹¹⁶

The New York Council of Revision went on to veto fifty-eight legislative enactments prior to the federal Constitutional Convention.¹¹⁷ John Jay, as Chief Justice, was a Council member.¹¹⁸ Despite the fact that the Council of Revision vetoes were often overridden by the legisla-

106. M. MACMILLAN, *supra* note 99, at 285-86 app.

107. *Id.* at 72-92. See also J. MAIN, *supra* note 11, at 191; Evans, *supra* note 105, at 187.

108. J. MAIN, *supra* note 11, at 190.

109. See JOHN JAY, *supra* note 31, at 389-418. Editor Morris reported that Jay had a copy of JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776) and was influenced by it. JOHN JAY, *supra* note 31, at 390.

110. C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789, at 36 (1923 & photo. reprint 1969).

111. B. MASON, *supra* note 31, at 242-43; E. COUNTRYMAN, *supra* note 41, at 169. See also A. YOUNG, *supra* note 28, at 20.

112. N.Y. CONST. art. III (1777), 7 W. SWINDLER, *supra* note 38, at 172-73 (1978).

113. J. MAIN, *supra* note 11, at 174. Main concluded, however, that the New York Governor was not a "democratic creation." *Id.* at 174-75.

114. B. WRIGHT, CONSENSUS AND CONTINUITY, 1776-1787, at 17-18 (1958).

115. J. MAIN, *supra* note 11, at 195.

116. A. YOUNG, *supra* note 28, at 25. See also *id.* at 22-25.

117. C. THACH, *supra* note 110, at 39.

118. E. COUNTRYMAN, *supra* note 41, at 184.

ture,¹¹⁹ it provided a model for the presidential veto in the federal Constitution.¹²⁰

The question whether a state constitution should include a gubernatorial veto became a crucial one in the process leading to the Massachusetts Constitution of 1780. John Adams' draft of the Massachusetts Constitution provided for an absolute gubernatorial veto.¹²¹ Elisha Douglass concluded that Adams' draft was "one of the most conservative to come from the pen of any Revolutionary leader."¹²² The constitutional convention, after narrowly rejecting the gubernatorial veto,¹²³ ultimately modified Adams' proposal to permit a legislative override of gubernatorial vetoes, a change which Adams later said was made "to my sorrow."¹²⁴

C. Checks and Balances in the Early State Constitutions

The founding decade clearly established a pattern of gradual transition from the early legislative dominance or "omnipotence", toward an increased role for the executive and judicial branches. In the early years of the Revolution, the judiciary had almost been forgotten. If anything, it was considered part of the executive power that was the target of such hostility in the early state constitutions. As experience with the dominant legislative branches continued, however, the judiciary and the executive came to be viewed as a necessary check on legislative encroachments upon the rights guaranteed by the constitutions and upon the prerogatives of the other branches.¹²⁵ The new executive and judicial powers, therefore, operated as checks on recognized legislative power rather than a sharing of legislative power. It is in this sense that the concern evolved from preoccupation with separation of powers, which responded to grievances against the Crown before the Revolution, towards practical mechanisms of checks and balances, in response to the

119. A. YOUNG, *supra* note 28, at 27.

"Although the Council of Revision returned more vetoes after than during the Revolution—eight in 1784, and nineteen in 1785—it was often reversed by the legislature. . . ." *Id.* at 62.

120. E. DOUGLASS, *supra* note 11, at 65; C. THACH, *supra* note 110, at 110-16.

121. E. DOUGLASS, *supra* note 11, at 191.

122. *Id.*

123. The vote in the convention was 44-32 to reject the veto. Two days later the compromise proposal carried on a vote of 44-24. O. & M. HANDLIN, *COMMONWEALTH; A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 25 n.83 (1947).

124. *Id.* at 197.

125. G. WOOD, *supra* note 11, at 452. On the rise of judicial power during the founding decade, see generally *id.* at 453-63; M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 157-58 (1967).

states' experiences with legislatively dominated, republican governments of 1776 to 1787.¹²⁶

III. State Constitutions in the Federal Constitutional Convention: Positive and Negative Models

The delegates to the federal Constitutional Convention, "first-generation republicans",¹²⁷ were obviously well aware of the state constitutions, the debates surrounding them, and the experience governing under them. Thus, John Dickinson scarcely needed to remind his fellow delegates in Philadelphia on August 13, 1787, that "[e]xperience must be our only guide."¹²⁸ Dickinson was referring to experience, as Douglass Adair later observed, in a "dual fashion to refer both to political wisdom gained by participation in events and wisdom gained by studying past events."¹²⁹ In fact, Dickinson placed more weight on the long view of history than the events of the founding decade. This is clear from his responses to delegates James Wilson and James Madison, who had warned of the problems experienced by states whose constitutions required that money bills only be initiated by the lower house of the legislature.¹³⁰ "Shall we," queried Dickinson, "oppose to this long [English] experience, the short experience of 11 years which we had ourselves, on this subject[?]"¹³¹ Still, however, this exchange illustrates the foremost place in the Framers' minds occupied by the still unfolding state constitutional developments.

James Madison, in discussing the proposed seven-year term for senators said: "It was to be much lamented that we had so little direct experience to guide us. The Constitution of Maryland was the only one that bore any analogy to this part of the plan."¹³² Later, when arguing for a required three-fourths majority to override a presidential veto, Madison

126. M. VILE, *supra* note 125, at 125-34, 141; Corwin, *supra* note 83; Williams, *supra* note 76.

127. C. KENYON, *supra* note 55, at xxxviii.

128. 2 M. FARRAND, *supra* note 88, at 278, *quoted in* D. ADAIR, *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 107, 109 (1974). Dickinson noted that "Eight States have inserted in their Constitutions the exclusive right of originating money bills in favor the popular branch of the Legislature." *Id.* at 278.

129. D. ADAIR, *supra* note 128, at 110.

130. *See id.* at 109. Wilson had argued that permitting only the lower house to originate money bills "had been found pregnant with altercation in every State where the Constitution had established it." 2 M. FARRAND, *supra* note 128, at 275.

131. 2 M. FARRAND, *supra* note 128, at 278.

"When, therefore, the convention assembled, virtually the only experience on which the members could draw in prosecuting the work before them was that of the state conventions of the last dozen years." J. JAMESON, *supra* note 9, at 18.

132. 1 M. FARRAND, *supra* note 128, at 218.

cautioned: "It was an important principle in this & in the State Constitutions to check legislative injustice and incroachments. The Experience of the States has demonstrated that their checks are insufficient."¹³³ In opposing a restriction on eligibility of members of Congress to hold other governmental positions, Nathaniel Gorham of Massachusetts argued that the "experience of the State Governments where there was no such ineligibility, proved that it was not necessary . . ."¹³⁴

The nature of constitution-making was captured by Elbridge Gerry when he reminded the Convention: "We must make concessions on both sides. Without these the constitutions of the several States would never have been formed."¹³⁵ Madison gave further expression to this sentiment when he argued for popular ratification of the federal Constitution "because the new national constitution ought to have the highest source of authority, at least paramount to the powers of the respective constitutions of the states . . ."¹³⁶

A. Positive Models

With many federal constitutional provisions modelled on state examples, it is quite clear that state constitutions had numerous positive influences on the federal Constitution. The most widely recognized of these is the Bill of Rights which, of course, was not added until several years after the Convention of 1787.¹³⁷ George Mason, drafter of Vir-

133. 2 M. FARRAND, *supra* note 128, at 587.

In arguing that the Ex Post Facto Clause would not be an effective check, Madison cited state examples of ex post facto laws enacted despite constitutional prohibitions, concluding that "experience overruled all other calculations." *Id.* at 376.

134. 2 M. FARRAND, *supra* note 128, at 491.

135. 1 M. FARRAND, *supra* note 128, at 515.

The report of the Committee of Detail stressed that the Constitution should "use simple and precise language, and general propositions, according to the example of the (several) constitutions of the several states." 2 M. FARRAND, *supra* note 128, at 137.

136. 1 M. FARRAND, *supra* note 128, at 126.

137. Even the Bill of Rights' origins in state constitutions and earlier colonial and English materials had been more or less forgotten until recently. In 1975, Justice Mosk of the California Supreme Court had to remind the bar and bench:

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

As to the English origins of the state declarations of rights, William Webster noted: The bills of rights of the American Revolution are only a link in a long chain of institutional development, running back through the English Bill of Rights and Petition of Rights to Magna Charta, and all these formal expressions were only crystallizations of previous institutional development.

Webster, *supra* note 3, at 384.

ginia's famous 1776 Declaration of Rights, had urged the Convention to include a Bill of Rights. As the records of the proceeding noted: "He wished the plan had been prefaced with a Bill of Rights, and would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."¹³⁸

The absence of a Bill of Rights from the proposed constitution was among the most well-known and effective of the antifederalist arguments against ratification.¹³⁹ Because the evolution of the Bill of Rights, including the influence of state constitutions, has been ably treated elsewhere,¹⁴⁰ it is the area least in need of study. We should focus rather on the debates over participation in, and the structure of, governmental institutions under the new state constitutions and the influence of these matters on the federal Constitution. Furthermore, the real controversies over the first state constitutions had little to do with "rights." What was at stake was how the new state governments would be structured and what groups in society would have the dominant role in making policy under the new governments. The question of "rights" as we think of them today was not at the forefront of these debates.¹⁴¹

In addition to the Bill of Rights, numerous other state constitutional provisions positively influenced the federal Constitution, including the development of the executive branch and the Senate. The recognition of

138. 2 M. FARRAND, *supra* note 128, at 587-88.

139. C. KENYON, *supra* note 55, at lxx-lxxi.

140. For materials tracing the influence of state constitutions on the Bill of Rights, see for example, Z. CHAFEE, JR., *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* (1952); S. FISHER, *supra* note 10, at 190-211; A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CHARTA AND CONSTITUTIONALISM IN AMERICA* (1968); G. OSTRANDER, *THE RIGHTS OF MAN IN AMERICA, 1606-1861* (1969); R. RUTLAND, *supra* note 35, at 119-25; B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 1789-1791* (1977); *SOURCES OF OUR LIBERTIES* (R. Perry ed. 1959); Dumbauld, *State Precedents for the Bill of Rights*, 7-J. PUB. L. 323 (1958).

For a provocative new treatment of the early state bills of rights, see W. NELSON & R. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 1789-1791* (1987).

141. The bills of rights in the first state constitutions were valuable as the basis for restricting the sphere of governmental authority and as expressions of liberal political philosophy, but they did nothing to make government more responsive to the people. The attainment of democracy required political equality and majority rule.

E. DOUGLASS, *supra* note 11, at 133. See also G. WOOD, *supra* note 11, at 61-62; Katz, *The Origins of American Constitutional Thought*, 3 PERSP. AM. HIST. 474 (1969):

For a long time, American political theorists and constitutional historians have been looking at things the wrong way round. They have sought the origins of the Bill of Rights, judicial review, and federalism, but they have seldom asked how an organic American view of constitutional government emerged out of the society, politics, and thoughts of the colonial era.

Id. at 488-89.

this positive modelling is obvious from John Adams' boast: "I made a Constitution for Massachusetts, which finally made the Constitution of the United States."¹⁴² Although clearly an oversimplification, Adams' claim contains an important element of truth.¹⁴³ Alexander Hamilton, not surprisingly, relied on positive modelling in the very first number of *The Federalist*, where he assured New Yorkers that the new federal Constitution was an "analogy to your own State constitution"¹⁴⁴

B. Negative Models

It is also now more clear that by 1787, after more than a decade of experience with the state governments, there were some state institutions and practices that a majority of the Framers did not wish to emulate. This was particularly true with respect to the widespread dominance of the legislative branch under most state constitutions. In introducing the Virginia Plan, Edmund Randolph, governor of Virginia, warned the delegates that "[o]ur chief danger arises from the democratic parts of our [state] constitutions. . . . None of the constitutions have provided sufficient checks against the democracy."¹⁴⁵ James Wilson of Pennsylvania echoed this concern when he admonished: "Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their Govt.? No. Sir, it is from the Natl. Councils that relief is expected."¹⁴⁶ Wilson had been an opponent of the 1776 Pennsylvania Constitution and many of the legislative policies of the period.

142. Letter from John Adams to Mercy Warren (July 28, 1807), *quoted in* R. PETERS, *supra* note 24, at 14.

143. Adams was probably more accurate when he said in 1788: "What is the Constitution of the United States . . . but that of Massachusetts, New York and Maryland. There is not a feature of it which can not be found in one or the other." C. BOWEN, *MIRACLE AT PHILADELPHIA* 199 (1966).

144. THE FEDERALIST NO. 1, at 6 (A. Hamilton) (Modern Library ed. 1937).

There are references, both favorable and unfavorable, to the state constitutions throughout THE FEDERALIST. In Number 47, for example, Madison criticized the state constitutions for their failure adequately to separate governmental powers. *Id.* NO. 47, at 316-20 (J. Madison). He continued this criticism in Number 48. *Id.* NO. 48, at 323-26 (J. Madison).

In Number 69, Hamilton defended the proposed four-year term for the President by referring to the "close analogy between *him* and a governor of New York, who is elected for *three* years . . ." *Id.* NO. 69, at 446 (A. Hamilton) (emphasis in original). In Number 81, Hamilton lauded the proposed federal Constitution's independent judicial power (with no final appeal to the legislature), noting that it was not "novel and unprecedented" but was rather "a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia; and the preference which has been given to those models is highly to be commended." *Id.* NO. 81, at 525 (A. Hamilton).

145. 1 M. FARRAND, *supra* note 128, at 26-27 (James McHenry's notes), *quoted in* M. JENSEN, *supra* note 49, at 169. *See also* W. ADAMS, *supra* note 4, at 113.

146. 1 M. FARRAND, *supra* note 128, at 253.

Concern about what was taking place in the states by 1786 to 1787, viewed by some as a crisis, was as important a stimulus for the Constitutional Convention as the perceived defects in the Articles of Confederation. James Madison noted this during the Convention, and reiterated the point in a letter to Thomas Jefferson just after the Convention closed.¹⁴⁷ Historian Edward Corwin observed that "at least of equal urgency [to replacing the Articles of Confederation] were the questions which were thrust upon [the Convention's] attention by the shortcomings of the state governments for their purposes."¹⁴⁸ More recently, Gordon Wood has argued that:

The Constitution created a national government whose strength and character were out of proportion to the obvious and acknowledged weaknesses of the confederation. . . . Only political conditions in the states—political conditions of the most threatening kind—can ultimately explain the creation of the Constitution. . . . By the 1780's many American leaders realized that these state assemblies were abusing their extraordinary powers. . . . These legislative abuses, many American leaders believed, flowed from too much democracy.¹⁴⁹

These concerns, leading to the Convention of 1787, prompted historian Staunton Lynd to refer to the federal Constitution as "the settlement of a revolution."¹⁵⁰

In view of this reaction to perceived "excesses of democracy" made possible by the constitutions of most states, it is clear that state constitutional models exerted *negative* influences on the drafting of the federal Constitution. A "reform caucus",¹⁵¹ the Constitutional Convention set out to reform not only the Articles of Confederation but also the state governments as they were constituted in 1787. This reform was accomplished indirectly by the enumerated powers of Congress contained in

147. *Id.* at 134. Madison noted the "necessity, of providing more effectively for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention." *Id.* See also Letter from Madison to Jefferson (Oct. 24, 1787) in J. BOYD, *supra* note 29, at 276; M. JENSON, *supra* note 50, at 193; B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 4-5 (1938).

148. Corwin, *supra* note 83, at 513. Corwin noted that James Madison viewed increased national power as an antidote to the "swollen prerogatives of the state legislatures." *Id.* at 536. See also D. LUTZ, *supra* note 12, at 118-19; Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 70-77 (R. Beeman, S. Botein & E. Carter eds. 1987).

149. Wood, *Democracy and the Constitution*, in *HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 40, at 6-8.

150. S. LYND, *CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION* 113 (1967). Others have referred to the federal Constitution as a "second revolution," C. THACH, *supra* note 110, at 23.

151. See Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961).

Article I, such as exclusive power over issuing money and determining legal tender,¹⁵² which operated to diminish the power of state legislatures. It was accomplished more directly through the Article I prohibitions on state legislatures, including the Contract Clause¹⁵³ and the clause guaranteeing the states a republican form of government.¹⁵⁴

The negative influence of state constitutional experience may also be seen in the development of the separation of powers, and checks and balances features of the federal Constitution. While this had no direct effect on the states, unlike the aggregation of federal power in Article I, it reflected strong and fundamental disapproval by a majority of the Framers of the way most state governments were constituted. These negative influences are further reflected in the debates and the Federalist defenses of the Constitution which criticized the abuses, primarily of property and contract rights,¹⁵⁵ by state legislatures exercising vast authority under their constitutional schemes.¹⁵⁶

Finally, at the time the Constitutional Convention met in 1787 a number of insurrections in the states, the most serious being Shays' Rebellion in Massachusetts, had generated a genuine fear that the states were unstable and vulnerable to "mob rule."¹⁵⁷ George Washington, for example, warned of "combustibles in every state, which a spark might set fire to."¹⁵⁸ To a certain extent, Shays' Rebellion must be seen as a controversy over the way Massachusetts' government, particularly the legislative branch with its conservative senate, was constituted.¹⁵⁹ Fear of local insurrections, combined with the clear inability of the Congress under the Articles of Confederation to deal with such problems, thus were additional major stimuli for the move to a stronger central government.

152. U.S. CONST. art. I, § 8, cl. 5; art. I, § 10, cl. 1.

153. U.S. CONST. art. I, § 10, cl. 1. *See generally* B. WRIGHT, *supra* note 147 (describing the background and evolution of the Contract Clause).

154. U.S. CONST. art. IV, § 4. *See generally* W. WIECEK, *supra* note 84 (describing the background and evolution of the Guaranty Clause).

155. "No theme is more pervasive in the political thought of America than the constant fear of redistribution of wealth or, as it was called, of tyranny of the majority." Horowitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J.L. & ECON. 621, 622 (1976).

156. *See supra* notes 145-149 and accompanying text.

157. "A fear of rebellion and violent overthrow of the state governments dogged these men and prompted them to arrange the Philadelphia Convention." W. WIECEK, *supra* note 84, at 27-28. *See also* C. THACH, *supra* note 110, at 17-19.

158. M. JENSEN, *supra* note 49, at 158.

159. *See generally* P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980) (treating the influences of Shays' rebellion on the Constitution); Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388 (1969); Pole, *Shays's Rebellion: A Political Interpretation*, in *THE REINTERPRETATION OF THE AMERICAN REVOLUTION, 1763-1789*, at 416 (J. Greene ed. 1968).

Conclusion

The Constitution, and the delegates who framed it, have been analyzed and studied from a number of different perspectives.¹⁶⁰ For example, Charles Beard argued that the economic interests of the Framers were the dominant influence leading to the Constitution.¹⁶¹ Others sought to refute such claims.¹⁶² Douglass Adair asserted that the Framers were motivated primarily by their desire for fame and immortality.¹⁶³ Still others emphasize the Framers' youth, energy, and political skill.¹⁶⁴

While cautioning that they were by no means the exclusive influence, or necessarily even the most important influence, this Article asserts that experience with the developing state constitutions in the "laboratories" of the founding decade was a major formative influence on the constitutional philosophy of most of the Framers. The Framers had both positive and negative experiences with the state constitutions of this period. The underlying texts and political theories of the state constitutions, together with the experience of living and governing under them, formed the bridge between the federal Constitution and earlier American constitutionalism. As historian Richard Beeman recently noted, "[I]t is now becoming apparent that it may only be through studies of legal and constitutional development in the individual *states* that we will be able to discover where we have been."¹⁶⁵

160. For an excellent review of the waves of historical writing on the Constitution, see Hutson, *supra* note 2, at 1. On the broader question of interpretations of the Revolution, see Appleby, *Liberalism and the American Revolution*, 49 NEW ENG. Q. 3 (1976); Greene, *The Social Origins of the American Revolution: An Evaluation and an Interpretation*, 88 POL. SCI. Q. 1 (1973); Kirby, *Early American Politics—The Search for Ideology: An Historiographical Analysis and Critique of the Concept of "Deference"*, 32 J. POL. 808 (1970).

161. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

162. See, e.g., R. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956); F. McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS ON THE CONSTITUTION (1958). For a revival and extension of Beard's basic thesis, see S. LYND, *supra* note 150, at 3-21.

163. D. ADAIR, *supra* note 128, at 3.

164. Elkins & McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 POL. SCI. Q. 181 (1961); Roche, *supra* note 151, at 799.

165. Beeman, Introduction, in BEYOND CONFEDERATION, *supra* note 148, at 3, 18.

